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Supreme Court of the United States

OCTOBER TERM—1946

No. 410

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Petitioner,

against

JOSEPH B. FLEMING and AARON COLNON as Trustees of The Chicago, Rock Island and Pacific Railway Company, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN GERDES,
One Wall Street,
New York, N. Y.

HENRY F. TENNEY,
120 South La Salle Street,
Chicago, Ill.

Counsel for Petitioner.

THE SORG PRINTING CO., INC., NEW YORK, N. Y.

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Citations

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the debtor in the above titled proceedings, respectfully prays that a writ of certiorari issue to review an order and decree of the United States Circuit Court of Appeals for the Seventh Circuit (R. 355), which was entered in the above cause on May 23, 1946, and which affirmed an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered June 15, 1945 (R. 309-316), approving a plan of reorganization of the debtor.

Opinions Below

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (R. 301-308) was filed on May 14, 1945; it has not been reported. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 343-355) was filed on May 23, 1946, and is reported in 155 F. (2d) 489.

Jurisdiction

The order and decree of the United States Circuit Court of Appeals for the Seventh Circuit, sought to be reviewed, was entered on May 23, 1946. Jurisdiction to issue the writ requested is found in the provisions of Section 24(c) of the Bankruptcy Act and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Sec. 347(a)).

Statute Involved

The pertinent provisions of the Bankruptcy Act, as amended, are found in the Appendix, *infra*, pages 14 to 17.

Statement

The Interstate Commerce Commission issued and approved a plan of reorganization of the debtor herein by its report and order dated October 31, 1940 (R. 31-161). It subsequently made certain modifications and corrected certain errors and inconsistencies in this plan by orders and reports dated July 31, 1941 (R. 162-196), October 2, 1941 (R. 197-200), and April 6, 1942 (R. 201-226). Hearings on the approval of this plan (which was to be effective as of January 1, 1942), and on objections to the plan, were held before the District Court.

The District Court, in its opinion dated June 3, 1943 (R. 261-297), found all objections to the plan so approved by the Commission to be "without merit with two exceptions. These are

> "(a) The claim of discrimination arising from the distribution of new common stock to the First & Refunding bondholders because of their second lien on the General Mortgage properties. The Commission should determine what, if any, portion, of the 335,844.2 shares of new common stock allotted to the First & Refunding bonds, should be allotted to the General Mortgage bonds, in addition to the securities allotted to them under the plan, in order to afford full compensatory treatment to the General Mortgage bonds; and
>
> "(b) The provisions of the plan relative to the appointment of reorganization managers. For the reasons heretofore given, the Court concludes that said provisions of the plan are not fair and equitable." (R. 297.)

In its order of June 25, 1943 (R. 299-300), the Court referred these matters to the Commission for further consideration.

With the two exceptions noted, the Court concluded "that the provisions of the plan comply with subsection (b) of Section 77 of the Bankruptcy Act, that the plan is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders." (R. 297.)

As the debtor's estate would, as of January 1, 1944, have a large surplus of cash on hand because of net profits in

the calendar years 1942 and 1943*, the Court, in its order of June 25, 1943, also requested the Commission (R. 300) to determine the distribution to be made among creditors of the anticipated surplus cash of the debtor and of such of the new securities originally intended to provide cash working capital as would no longer be needed for that purpose.

The Commission held hearings to consider the matters referred to it, as aforesaid, by the Court. It gave its attention *solely* to these matters, and refused to consider any other material modifications in the plan, saying, "approval of either the debtor's proposal or of the convertible bondholders' group's proposal would necessitate material modification in the plan and, in our opinion, is not warranted" (R. 234).

As a result of its consideration of the matters referred to it by the Court, the Commission, in its report of January 3, 1944 (R. 227-248):

1. Held that holders of General Mortgage Bonds receive full compensatory treatment under the plan (detailed discussion R. 237-243; summary conclusion, last paragraph of R. 242).

2. Provided that the appointment of members of the reorganization committee be subject to the ratification of the Court (R. 246).

3. Postponed the effective date of the plan from January 1, 1942 to January 1, 1944 (R. 230-232).

4. Found that additional new first mortgage bonds in the principal amount of $12,409,600 are available for distribution to creditors because the net earnings for 1942 and 1943 have made their issuance no longer necessary to pro-

* Profits of more than $72,000,000 were actually realized in these years (R. 303).

vide new money for the reorganized debtor or to pay accrued interest on some of the senior securities (R. 232); and provided that said $12,409,600 of additional bonds should be distributed by "the method approved for the distribution of the other new first mortgage bonds under the plan [effective as of January 1, 1942], that is, on the basis of the relative adjusted earnings of the respective mortgaged properties for 1936 and 1937" (R. 234). (Material in brackets has been added.)

5. Found that cash in the amount of $38,011,922 was available for distribution as a result of the 1942 and 1943 net earnings of the debtor, and that such cash should be distributed as eight years of interest on the new first mortgage bonds, four years of interest on the new contingent interest bonds, two years of dividends on the new preferred stock, and $2.50 per share on the new common stock (R. 234-235).

The Commission did *not*, in the plan effective as of January 1, 1944, change any allotment of securities made in the plan effective as of January 1, 1942, with the exception of the addition of the new first mortgage bonds allotted under the proposed distribution described in the foregoing paragraph numbered "4". (Compare the allotments of new income bonds, preferred stock and common stock at R. 220-221 with the allotments at R. 259.)

The United States District Court for the Northern District of Illinois, Eastern Division, by its order of June 15, 1945 (R. 309-316), approved the plan of reorganization which embodies the foregoing conclusions of the Commission; and the United States Circuit Court of Appeals for the Seventh Circuit, by its order and decree entered May 23, 1946 (R. 355), affirmed said order of the District Court dated June 15, 1945.

The debtor contested the validity of the aforesaid proposed distribution of $12,409,600 of new first mortgage

bonds and $38,011,922 of cash, at the hearings before the Commission (R. 318-319), at the hearings before the United States District Court (R. 330-331), and on its appeal to the United States Circuit Court of Appeals for the Seventh Circuit (R. 336).

Questions Presented

The review requested herein raises questions as to the legal and equitable standards to be applied in the distribution among creditors of securities and cash of the debtor—available for distribution because of net earnings during the period of postponement—when the effective date of a plan of reorganization is postponed two years.

In *R.F.C.* v. *Denver & Rio Grande Western Rr.*, 90 Law. ed. (Advance Opinions) 1134, this Court held that where there has been an allocation of securities under a plan, those to whom the securities are allotted are entitled, after the date as of which the securities are to be delivered, to all the rights subsequently accruing under the terms of the securities thus allotted. Creditors allotted new common stock are thereafter entitled to the benefit of all earnings which are in excess of the amounts necessary to meet interest and charges on new senior obligations. Those allotted common stock are entitled to divide the earnings of "lush years" (p. 1146). If there is more cash on hand than needed for taxes, expenses, interest on bonds, dividends on preferred stock, and proper improvements, it is at the disposal of the common stockholders.

> "There is another important factor, corollary to stock ownership, to be noted in the Commission's allocation of these securities. This factor is that the creditors who received common stock to make them whole obtained with that common stock an interest in all cash on hand or all cash that might be accumulated. * * * If there is more cash on hand

than needed, for taxes, expenses and proper improvements, it is at the disposal of the common stockholders." (p. 1146-1147).

"* * * Assets in the balance sheet at the adoption of the plan, and subsequent earnings, are, as we have pointed out, for the benefit of the stockholders in the new company so that through these common stock advantages these new stockholders may be compensated for their loss of payment in full in cash." (p. 1150).

In its opinion this Court also held that new securities released by the payment of senior indebtedness after the effective date should not be distributed to the old creditors, senior or junior, but should be disposed of for the benefit of the holders of the new common stock, whose assets were used in the retirement of such debt.

"Under our determination that the creditors who received common stock were compensated partly by the assets and future earnings, it is obvious that the use of such assets to retire senior claims is a part of the normal and expected increment from holdings of common stock." (p. 1150).

The foregoing principles were not applied in the distributions made in this case.

In the plan approved herein, it is not proposed that the $12,409,600 of additional first mortgage bonds, available for distribution because of the net earnings of the debtor in 1942 and 1943, be distributed in accordance with the rights created by the new securities allotted under the plan, but according to "the method approved for the distribution of the other new first mortgage bonds under the Plan, that is, on the basis of the relative adjusted earnings of the respective mortgaged properties for 1936 and 1937" (R. 234). On this basis, creditors previously allotted

$18,507,460 of the new first mortgage bonds are to receive an additional $12,409,600 of such bonds although the interest on their bonds for the period of the two year extension of effective date is only $1,400,596.80.

Nor is it proposed that the $38,011,922 of cash be distributed as two years of earnings under the terms of the new securities allotted, although the cash was actually earned during the two year period of the extended effective date. On the contrary, it is proposed that the cash be distributed as a wholly arbitrary payment of eight years of interest on the new first mortgage bonds, four years of interest on the new income bonds, two years of dividends on the new preferred stock, and $2.50 per share on the new common stock. On this basis creditors allotted new first mortgage bonds will receive four times as much as they are entitled to and creditors allotted new income bonds will receive twice as much as they are entitled to, while creditors allotted new common stock will only receive approximately 11% of what they should receive.

The questions are:

1. Is the proposed distribution of $12,409,600 of new first mortgage bonds in accordance with proper legal and equitable standards?

2. Is the proposed distribution of $38,011,922 of cash in accordance with proper legal and equitable standards?

Specification of Errors to be Urged

The debtor respectfully submits that the Commission and the courts below erred:

1. In the proposed distribution of $12,409,600 of additional new first mortgage bonds, available for distribution because of the net earnings of the debtor in 1942 and 1943.

2. In the proposed distribution of $38,011,922 of cash, available for distribution because of the net earnings of the debtor in 1942 and 1943.

Argument

It is the contention of the debtor that the proposed distributions are illegal and inequitable, and violate the standards fixed by this Court in the *Denver & Rio Grande* case, 90 Law. ed. (Advance Opinions) 1134.

As the Commission, on its reconsideration of the plan, refused to reappraise the entire situation, revalue the claims of the old creditors, and reallot the new securities provided under the plan, it is clear that its valuations all relate back to January 1, 1942, the effective date of the original plan. This date is the Rock Island equivalent of the "effective date" referred to in the Denver Rio Grande decision—it is the date at which the rights of those allotted shares of the new common stock and other securities became fixed.

The cash fund which made it unnecessary to issue the $12,409,600 of new first mortgage bonds to provide new working capital was either "assets in the balance sheet" on January 1, 1942, or "subsequent earnings" (*Denver & Rio Grande* opinion, p. 1150). In either case these bonds should be applied "for the benefit of the stockholders in the new company" (p. 1150), after payment of interest and dividends on the new bonds and preferred stock.

So, too, the $38,011,922 of cash available for distribution on December 31, 1943, was either "assets in the balance sheet" on January 1, 1942, or "subsequent earnings"; in either of which events it should be distributed to the "stockholders in the new company" after payment of interest and dividends on the new bonds and preferred stock.

The proposed distribution of said securities and cash in the plan is not made on the basis of the allotment of the new securities of the debtor. Instead, the distribution is made primarily to the old senior creditors in complete disregard of the doctrine of the *Denver & Rio Grande* decision.

The following table demonstrates the illegality of the combined proposed distribution of the $12,409,600 of additional new first mortgage bonds and $38,011,922 cash approved by the Commission and the courts below:

	Distribution Proposed in Plan*	Distribution under Denver & Rio Grande Doctrine**	Proposed Distribution compared with Distribution under Denver & Rio Grande Doctrine
General Mortgage	$249.36	$166.15	150%
First & Ref.	135.51	162.33	83%
Secured 4½s	152.45	182.42	84%
C. O. & G.	195.03	143.63	136%
St. P. & K. C. S. L.	87.97	165.95	53%
Rial	174.69	152.04	114%
L. R. & H. S. W.	116.84	49.62	235%
B. C. R. & N.	56.20	150.20	37%
Convertible 4½s	12.42	95.33	13%
General Creditors	12.42	95.33	13%

* These figures consist, in each instance, of the sum of the cash proposed to be paid and the additional new first mortgage bonds proposed to be allotted, per $1,000 principal amount of claim.

** These amounts were fixed as follows: From the total of $50,421,522 of new first mortgage bonds and cash available for distribution, interest on the new bonds and dividends on the new preferred stock (in each case, for two years) were deducted; the balance was then apportioned to the new common stock (amounting to approximately $22. per share); each $1,000 of principal amount of old claims was then credited with the amounts receivable as interest and dividends on the new bonds and shares allotted to it.

As an alternative to a distribution based on giving effect to the terms of the new securities allotted in the plan (herein referred to as the "*Denver & Rio Grande* Doctrine"), it may be argued that distribution may legally and equitably be based on the terms of the old securities

(hereinafter referred to as the "*Milwaukee* Doctrine"). Under such a distribution, the amounts distributable as interest on the old bonds, for the two year period of postponement of effective date, compared with the distribution approved herein by the Commission and courts, would be as follows, per $1,000 principal amount of claim:

	Distribution Proposed in Plan	Distribution under Milwaukee Doctrine	Proposed Distribution compared with Distribution under Milwaukee Doctrine
General Mortgage	$249.36	$ 80.00	311.7%
First & Ref.	135.51	80.00	169.4%
Secured 4½s	152.45	90.00	169.4%
C. O. & G.	195.03	100.00	195 %
St. P. & K. C. S. L.	87.97	90.00	97.5%
Rial	174.69	90.00	194.1%
L. R. & H. S. W.	116.84	80.00	146 %
B. C. R. & N.	56.20	100.00	56.2%
Convertible 4½s	12.42	90.00	13.6%
Gen'l Creditors	12.42		

The Milwaukee Doctrine was upheld by the United States Circuit Court of Appeals for the Seventh Circuit in *In re Chicago, Milwaukee, St. Paul & Pacific Rr. Co.*, 145 F(2d) 299, (cert. denied, 324 U.S. 857), at page 302. It was also applied herein by the Commission in its distribution of $17,000,000 of additionally authorized securities when it changed the effective date of the plan from January 1, 1941 to January 1, 1942 (report of Commission dated July 31, 1941 — R. 162-196).

Reasons for Granting the Writ

1. The decision below presents an important question in reorganization proceedings, particularly proceedings under the Bankruptcy Act. Until this question is settled

by this Court, substantial confusion will exist in determining the disposition to be made of the income of debtors during the pendency of reorganization proceedings, especially where circumstances make it desirable to postpone the effective date of a plan.

2. The decision of the Commission and the courts below is in conflict with the reasoning of this Court in the *Denver & Rio Grande* case, 90 Law. ed. (Advance Opinions) 1134. It is also in conflict with the distribution approved by the Circuit Court of Appeals for the Seventh Circuit in *In re Chicago, Milwaukee, St. Paul and Pacific Rr. Co.*, 145 F(2d) 299.

Conclusion

The debtor respectfully submits that the decision of the United States Circuit Court of Appeals for the Seventh Circuit is erroneous, that the questions involved are of general public importance, and that it is in the public interest to have those questions answered as soon as practicable by an authoritative decision of this Court.

Attention of this Court is respectfully called to the fact that after the Circuit Court of Appeals for the Seventh Circuit entered its order and decree affirming the decisions of the Commission and the District Court approving the plan, hearings were held by the United States District Court for the Northern District of Illinois, Eastern Division, on the confirmation of the plan. As a result of such hearings, said District Court duly entered an order herein on June 28, 1946, entitled "ORDER THAT THE PLAN OF REORGANIZATION BE NOT CONFIRMED AND THAT THE CASE BE REFERRED BACK TO THE INTERSTATE COMMERCE COMMISSION FOR FURTHER PROCEEDINGS". Appeals from said order have been taken by various parties to the United States Circuit Court of Appeals for the Seventh Circuit.

So long as the aforesaid order of the District Court entered June 28, 1946, is in effect, the questions as to which the debtor seeks review by this application for a writ of certiorari are moot. It therefore respectfully requests that this Court withhold action on this application for a writ of certiorari until the finality of the order of the District Court entered June 28, 1946 has been determined. This application is filed to preserve the right of the debtor to question the matters herein referred to, if the order of the District Court refusing to confirm the plan is reversed.

WHEREFORE, the debtor respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, directing that Court to certify and send to this Court for its review and determination on a day certain to be named therein a transcript of the record and proceedings herein; that the judgment of said Court be reviewed in so far as it approves the plan of reorganization; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated New York, N. Y., August 20, 1946.

JOHN GERDES
HENRY F. TENNEY
Counsel for Petitioner

APPENDIX

The Bankruptcy Act, as amended:

Sec. 24(c). The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. (11 U.S.C.A. section 47(c).)

Sec. 77(b). A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are now otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings, experience, and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations,

the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section. (11 U.S.C.A. section 205(b).)

Sec. 77(d). The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order

in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be comparable with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court. (11 U.S.C.A. section 205(d).)

Sec. 77(e). Upon the certification of a plan by the Commission to the court, the court shall give notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the ap-

proximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made under or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

* * * * *

If it shall be necessary to determine the value of any property under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts. (11 U.S.C.A. section 205(e).)

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REPLY BRIEF OF PETITIONER

JOHN GERDES,
One Wall Street,
New York, N. Y.

HENRY F. TENNEY,
120 South La Salle Street,
Chicago, Ill.

Counsel for Petitioner.

THE SORG PRINTING CO., INC., NEW YORK, N. Y.

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REPLY BRIEF OF PETITIONER

The debtor believes it requisite to make a concise reply to several assertions and arguments advanced in Respondents' brief.

1. The debtor has standing to apply for certiorari, since Section 77 by explicit terms affords that right and every court considering the problem has so held.

It is argued in Respondents' brief that the debtor has no status to seek review in this Court on the questions of law presented. The same argument was made by Respondents before the Circuit Court of Appeals, the District Court and the Commission, and each time was rejected.

Section 77 (f) provides: "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, *subject to the right of judicial review,* be binding upon the debtor * * *." (Emphasis supplied.) This language expressly confers upon the debtor "the right of judicial review" as to provisions of the plan.

Section 77 (c)(13) also provides that "the debtor * * * shall have the right to be heard on *all* questions arising in the proceeding". (Emphasis supplied.) Similar language in Section 206 of Chapter X has been held to grant the right to appeal. In re *Keystone Realty Holding Co.,* 117 F. (2d) 1003, 1005 (C.C.A. 3d, 1941); *Dana* v. *Securities and Exchange Commission,* 125 F. (2d) 542, 543 (C.C.A. 2d, 1942).

The debtor makes no contention that it may speak for creditors or stockholders individually. It does contend, however, that it represents the estate as a whole and that its right and duty is to present to the Commission and the courts the respects in which the Rock Island plan of reorganization fails to conform with proper legal and equitable standards. In doing this, the debtor is acting for the benefit of all creditors, *secured* and unsecured, and all stockholders, preferred and common, who are injured by the fact that the plan is not fair and equitable, except those who act directly in their own behalf, and those who have *expressly* delegated to committees or other representatives the power to act for them.

Recent cases in this Court clearly recognize the debtor's right to appeal on behalf of the entire estate from approval of a Section 77 reorganization plan even in the face of a finding below that no equity remains in the debtor's property for stockholders. In *Ecker* v. *Western Pacific R. Corp.,* 318 US 448 (1943) the outstanding stock was found to be valueless by the Commission and District Court, but the debtor was permitted, on a rehearing (p. 140), to

appeal to the Circuit Court of Appeals, 124 F. (2d) 136, 140 (C.C.A. 9th, 1942), was granted certiorari by this Court, 316 US 654 (1942), and argued on the merits of the appeal, 318 US 448 (1943). As shown by the summary of the debtor's argument in that case (87 L. ed. 907-909), it argued primarily for junior creditors.

In *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul, and Pacific R. Co.*, 318 US 523 (1943), the debtor took an appeal from the order approving the plan and was heard in the Circuit Court of Appeals, 124 F. (2d) 754 (C.C.A. 7th, 1942). Later the debtor briefed and argued as an appellee to this Court, 318 US 523 (1943).

Similarly, in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R. Co.*—US—(June 10, 1946), the debtor, taking appeals from the orders of approval and confirmation, was heard in the Circuit Court of Appeals, 150 F. (2d) 28 (C.C.A. 10th, 1945), and on certiorari argued the case to the Supreme Court,—US—(June 10, 1946). It appears in the opinion of the Court that the Denver & Rio Grande stock had been held valueless, but nevertheless the debtor was permitted without challenge to argue on behalf of creditors. 90 L. ed. (Adv. op.) 1134, 1136 (1946).

In *Continental Illinois National Bank and Trust Co.* v. *Chicago, Rock Island and Pacific R. Co.*, 294 US 648 (1934), it was the debtor which made the application and secured this Court's order staying bank creditors and the RFC from selling their collateral, and the debtor, as appellee, briefed and argued the appeal to the Circuit Court of Appeals, 72 F. (2d) 443 (C.C.A. 7th, 1934). Although the debtor in taking this action was acting primarily for the interests of creditors, no question was raised as to its authority so to do.

All courts dealing with this issue have given recognition to a debtor's right to seek review of the reorganization plan on behalf of creditors as well as stockholders.

2. Application of the Denver & Rio Grande and Milwaukee doctrines.

Respondents question the applicability to this case of either *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R. Co.*,—US—(June 10, 1946) or In re *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 145 F. (2d) 299 (C.C.A. 7th, 1944), in so far as those cases deal with the distribution of profits earned during the course of reorganizations.

THE DENVER & RIO GRANDE DOCTRINE—The *Denver & Rio Grande* case is cited by the debtor for the proposition that when in a Section 77 reorganization a valuation as of a specfied date is made of the worth of creditors' claims through the allotment of new securities, the rights conferred by said new securities become effective as of said date; earnings received after that date must be distributed in accordance with the terms of the new securities. *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R. Co.*, 90 L. ed. (Adv. op.) 1134, 1146-7, 1150 (1946).

In the present case the Commission's valuations were all directed to the date January 1, 1942, and the terms and allocation of new securities were based upon a valuation of said securities as of that date. No new valuations were subsequently made. The Commission refused to make new valuations as of January 1, 1944, although requested to do so by the debtor, the convertible unsecured bondholders and the preferred stockholders.

The valuation of the new securities as of January 1, 1942, necessarily was based on the assumption that after that date all distributions of earnings and assets of the debtor would be made under the terms of the new securities. Old creditors to whom new bonds had been allotted were entitled to the rights conferred by their new bonds, while old creditors allotted shares of stock were entitled to dis-

tributions, when made, according to the terms of their new securities. Instead of these rights, under the proposed distribution creditors allotted new first mortgage bonds entitling them to 4% interest per annum are to receive, for the two years from January 1, 1942 to January 1, 1944, 67% of the face amounts of their new bonds in additional new first mortgage bonds and 32% of the face amounts of their new bonds in cash—a total return of 98%* on their new bonds for a period of two years—49%* per year instead of 4%. They receive over 1200% of the amount to which they are entitled, while creditors allotted shares of the new common stock are to receive only 13% of the amounts distributable to them under the terms of their new securities.

Under the *Denver & Rio Grande* case the only means open to the Commission to give effect to valuations made as of January 1, 1942 without making revaluations as of 1944 was to make distributions after January 1, 1942 in accordance with the terms of the new securities authorized in the plan. This, as has been reiterated, the Commission did not do, but with seeming arbitrariness gave the controversial profits primarily to the old senior creditors.

When the Commission advanced the plan's effective date from January 1, 1942 to January 1, 1944, it did so because it was its opinion that (R. 231):

> "* * * to apply a plan from a date remote from the actual transfer of property to the reorganized com-

* Attention is called to the fact that these percentages are on the *new* first mortgage bonds allotted under the plan. Since no class of the old securities is to receive complete payment in new first mortgage bonds, these percentages are not applicable in their entirety to any class of the old bonds. However, as shown by the table on page 10 of the debtor's Petition herein, these percentages, when translated into the total distributions made to the various classes of *old* bonds, also result in marked discriminations—one class receiving as much as 235% of what it is equitably entitled to, while some other classes receive only 13% of their equitable shares.

> pany and the issue of securities involves many questions of accounting and of decisions on the adjustment of rights as between the old creditors and the new security holders, on the setting up and dispositions of reserves and funds required by the plan, and as to the treatment of funds available for possible dividends and general corporate purposes. Tax accruals during the transition period also present questions in this connection."

Normally, as in the *Denver & Rio Grande* case, the so-called "effective date" is the date of valuation as well as the date fixed for administration and accounting purposes. In the case at bar, however, the effective date of January 1, 1944 is the date fixed only for administration and accounting purposes, while January 1, 1942 is the date of the valuation which fixes the rights of those to whom the new securities are allotted.

The District Court in this case originally recognized the Denver & Rio Grande doctrine by directing the Commission to make the distributions "in accordance with the allocations of the new securities made in the plan" (R. 300; R. 228), but it nevertheless subsequently approved the Commission's arbitrary distributions of $12,409,600 of first mortgage bonds and $38,011,922 of cash although such distributions were not in accordance with the allocations of the new securities under the plan.

THE MILWAUKEE DOCTRINE.—Respondents question the debtor's statement that the United States Circuit Court of Appeals for the Seventh Circuit approved, upon change of the effective date of the plan in the Milwaukee reorganization, a distribution of cash to senior creditors equal to the interest accruing on their old bonds during the period of the extension. Here is the Court's own statement of the distribution approved by it:

"As we understand, the senior creditors were entitled to contract interest only to the effective date of the Plan, and the cash distribution directed would be the substantial equivalent of the contract rate during the five year period created by changing the effective date." In re *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 145 F. (2d) 299, 302 (C.C.A. 7th, 1944).

3. Errors in Respondents' Brief.

The debtor regrets that it is necessary to call attention to the fact that Respondents misstate the contentions of the debtor in the lower courts. They state that "the Debtor argued that the creditors were 'paid in full' by the allotment of securities contained in the first Plan certified by the Commission to the District Court in July, 1941" (Respondents' Brief p. 5). The fact is that the debtor has at all times since the Commission certified said plan fought for a larger recognition of the rights of junior creditors on the ground that they are *not* paid in full under the plan (R. 317-328; R. 329-332).

Respondents wilfully assume that the debtor speaks only for stockholders, or, at most, also for unsecured creditors. The contrary is true. The debtor speaks for *secured* creditors as well as unsecured creditors and stockholders. It contends that the disputed distributions are unfair to classes of secured creditors as well as classes of unsecured creditors. (See table on page 10 of debtor's Petition herein.)

If the plan is inequitable as to any class of creditors or stockholders, it is the duty of the debtor to call attention to the inequity; and it is the duty of the court to correct it. A reorganization proceeding is not an adversary proceeding involving two evenly matched antagonists, but a proceeding in which the debtor, the Commission and the courts are all charged with the duty of protecting the rights of thousands of security holders who are unable to actively

protect their own rights. No committee or indenture trustee purporting to represent any class of creditors has the power to bind all the members of such class to a plan which is not fair and equitable.

There is also an assumption by Respondents that all *secured* creditors must be paid in full before unsecured creditors may participate under the plan (Respondents' Brief, page 5). Obviously, this is not the law. Secured creditors are entitled to priority only to the extent of the value of their security. They are unsecured creditors—and participate on a parity with other unsecured creditors—to the extent to which their claims exceed the value of their security.

Exception is also taken to the statement of Respondents (their Brief, page 12) that the order of the District Court denying confirmation of the plan and referring it to the Commission for further consideration "relates only to the rights of one class of creditors, the unsecured Convertible Bondholders, which did not vote to accept the plan". The plan was also rejected by the holders of Little Rock, Hot Springs and Western bonds. Nor did the District Court restrict the reference to the Commission to a reconsideration of the rights of these two classes of claims. Its order sends the plan to the Commission "for further proceedings in accordance with the opinion of this Court filed herein this day, including consideration of the modification of the Plan or the proposal of new plans".

4. Statement

A petition for a writ of certiorari was filed herein by the Committee for Preferred Stockholders on September 20, 1946, and certain holders of Convertible Unsecured 4½% Bonds also propose to file a petition before the expiration of their time to do so.

5. Conclusion

The prayer of the debtor is respectfully renewed that this Court withhold action on the petition of the debtor for a writ of certiorari until the finality of the order of the District Court refusing confirmation is determined, and that if the said order is reversed, the writ of certiorari be issued.

Dated, New York, N. Y., September 23, 1946.

JOHN GERDES
HENRY R. TENNEY
Counsel for Petitioner

APPENDIX

The Bankruptcy Act, as amended:

Sec. 77 (c) (13). "* * * The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and, upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene."

Sec. 77 (f). "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, * * *."

INDEX.

Citations.

Opinions Below.

In re The Chicago, Rock Island and Pacific Railway Company (D. Ill. E. D., May 14, 1945) (unreported).

In re The Chicago, Rock Island and Pacific Railway Company (C. C. A. 7th, 1946) (unreported).

Supreme Court of the United States

OCTOBER TERM, 1946

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Petitioner,

against

JOSEPH B. FLEMING and AARON COLNON, as Trustees of The Chicago, Rock Island and Pacific Railway Company, et al.,
Respondents.

No. 410.

BRIEF OF RESPONDENTS:

1. METROPOLITAN LIFE INSURANCE COMPANY, AS REMAINING MEMBER OF THE FIRST AND REFUNDING GROUP,
2. TRUSTEES UNDER THE FIRST AND REFUNDING MORTGAGE,
3. TRUSTEE IN RESPECT OF THE SECURED 4½% BONDS, SERIES A,
4. PROTECTIVE COMMITTEE FOR THE GENERAL MORTGAGE BONDS,
5. TRUSTEES UNDER THE GENERAL MORTGAGE,
6. PROTECTIVE COMMITTEE FOR THE ROCK ISLAND, ARKANSAS AND LOUISIANA RAILROAD COMPANY FIRST MORTGAGE 4½% BONDS,
7. PROTECTIVE COMMITTEE FOR CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY CONSOLIDATED MORTGAGE 5% BONDS AND CHOCTAW AND MEMPHIS RAILROAD COMPANY FIRST MORTGAGE 5% BONDS,

IN OPPOSITION TO DEBTOR'S PETITION FOR WRIT OF CERTIORARI.

Statement.

The Debtor has applied to this Court for a writ of certiorari to review the order and decree of the United States Circuit Court of Appeals for the Seventh Circuit,

dated May 23, 1946, affirming a United States District Court order dated June 15, 1945, approving a modified Plan of Reorganization certified by the Interstate Commerce Commission to the District Court on May 1, 1944.

We respectfully submit that the Debtor's petition for certiorari should be denied:

1. Because the Debtor has no standing to apply for certiorari, since the questions it seeks to present concern only the creditors and do not affect the Debtor; and

2. Because the questions sought to be presented are factual issues of valuation, and no question of law warranting review by this Court is involved.

Argument.

1. The Debtor has no standing to apply for certiorari, since the questions it seeks to present concern only the creditors and do not affect the Debtor.

The Debtor did not contend below, and does not contend here, that there is any equity in the Debtor's property for the Debtor or its stockholders. The Circuit Court of Appeals held in its opinion (R., p. 351) that claims of the secured creditors of the Rock Island are unsatisfied under the modified Plan to the extent of about $54,000,000 if the new no par value common stock is taken at $100 a share, and to the extent of about $106,000,000 if the new no par value common stock is taken at $50 a share, which is what it has been adjudicated to be worth in this proceeding by the Interstate Commerce Commission and the United States District Court. The Debtor does not dispute that there is this enormous deficiency which would have to be overcome before there could be any recognition from the mortgaged assets for the large amount of unsecured claims, or that

an additional enormous deficiency in satisfying the unsecured claims would have to be overcome before there could be any recognition for the Debtor or its stockholders.

Therefore, as the Court said below (R., p. 347):

> "The debtor seeks nothing for itself. It is in the anomalous but commendable position of arguing for others. The debtor, appropriately, does not question the valuations of the Commission."

We submit that in this situation the Debtor has no standing to seek review in this Court on the questions it seeks to present, since they would not affect the Debtor no matter how they were decided.

2. The questions sought to be presented are factual issues of valuation, and no question of law warranting review by this Court is involved.

Of all the many points which had to be determined by the Commission and the District Court or agreed to by the parties in arriving at the modified reorganization Plan for this large and complicated railroad system, the Debtor picks out two which it seeks to present to this Court. The two questions relate to the allocation of cash and additional new First Mortgage Bonds in the modified Plan approved by the Commission and by the District Court after the first Plan was sent back to the Commission by the District Court in 1943. The secured creditors who share in the cash and additional First Mortgage Bonds agreed to the allocation thereof or did not object to it. Yet the Debtor seeks to come before this Court and argue points on behalf of creditors who raise no such objections and would have no standing to raise them.

The facts with respect to the allocation of the cash and additional First Mortgage Bonds are these:

The Rock Island reorganization proceedings commenced in June, 1933. The Commission first certified a Plan to the District Court in July, 1941. The District Court held hearings on the Plan in October, 1941. At that time the *Milwaukee* case and the *Western Pacific* case were on their way to this Court. Those cases, settling fundamental legal questions regarding Section 77 reorganizations, were decided by this Court in March, 1943. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523 (1943); *Ecker* v. *Western Pacific Railroad Corp.*, 318 U. S. 448 (1943).

While those appeals were pending, the District Court took no action in the *Rock Island* case. After this Court's decisions on those appeals, the District Court, in June, 1943, rendered its opinion approving the Plan first certified to it with only two exceptions (R., p. 297). When the District Court sent the Plan back to the Commission for correction on these two exceptions, it also suggested that the Commission distribute among creditors the cash which was available for distribution and make other appropriate adjustments in the allocations of new securities (R., pp. 299-300).

The Commission held a hearing in September, 1943, and then modified the Plan by distributing among creditors approximately $38,000,000 in cash, which was all that would be available for distribution at December 31, 1943 in accordance with testimony of the Trustees of the Rock Island Estate. The Commission also distributed among creditors $12,409,600 of additional new First Mortgage Bonds which it found to be available primarily because the Estate would not need the $11,000,000 of new First Mortgage Bonds

which had been reserved for sale for cash. The total allocations of cash and new securities under the modified Plan appear at page 259 of the record.

In the lower courts, the Debtor argued that the creditors were "paid in full" by the allotment of securities contained in the first Plan certified by the Commission to the District Court in July, 1941, and that any improved treatment of the secured creditors in the modified Plan as compared with the first Plan represented more than 100% satisfaction of their claims. The obvious fallacy is that the creditors' claims were not satisfied under the first Plan. Nothing more need be shown in support of this than the finding of the Court below that even with the improved treatment in the second Plan $106,000,000 of the claims of secured creditors remained unsatisfied (R., p. 351).

The Debtor complained below, and complains here, of the method used by the Commission in distributing the cash and additional new First Mortgage Bonds among the creditors under the modified Plan. This we submit is a factual valuation question and presents no question of law. The $12,409,600 additional new First Mortgage Bonds were allocated among creditors by the same method which the Commission had found fair and equitable for distribution, on the basis of comparative earnings, of new First Mortgage Bonds allocated under the Plan first certified, and the District Court approved the allocation (R., pp. 234, 304). So far as the distribution of the $38,000,000 of cash is concerned, the distribution was based on the allocations of the respective classes of new securities under the Plan. The Commission said as to that distribution (R., pp. 234-6):

> "*Method of distribution of surplus cash.*—The first and refunding group proposes that the surplus cash be distributed among the creditors on the basis of the relative earnings of the various mortgaged

properties as determined by the allocation of new securities approved in the present plan. This proposal contemplates the distribution to those who will receive the new securities of cash amounting to 8 years' interest on the new first-mortgage bonds, 4 years' interest on the new income bonds, 2 years' dividends on the new preferred stock, and a dividend of $2.50 per share on the new common stock. The total accrued unpaid interest on the Choctaw & Memphis bonds also would be paid in cash. This method of distribution, the group contends, is fair and equitable since it gives effect to the earnings of the debtor and its cash position during the period when the cash was produced.

"The group first reviewed the earnings record of the debtor during this proceeding to see approximately how distributions would have been made under the plan on the reorganization securities had they been issued. The years prior to 1936 were dropped from consideration on the theory that the proceeding commenced halfway through 1933, and 1935 was a deficit year. In the 8 years from 1936 to 1943, inclusive, it appeared from the debtor's income available for interest that all accrued unpaid interest on the Choctaw & Memphis bonds had been earned, likewise all fixed interest on the new first-mortgage bonds and on the new Reconstruction Finance Corporation note, 4 years' contingent interest on the new income bonds and Reconstruction Finance Corporation note, and dividends on the new preferred stock for the 3 years from 1941 to 1943, inclusive, with an excess over such dividends in those years. Distribution of the surplus cash on that basis, however, would not have permitted any distribution in respect of the new common stock. Another factor considered by the group was that while earnings in each of the 6 years, 1936-41, inclusive, would have taken care of 6 years' fixed interest, 2 years' contingent interest, and preferred-stock dividends for

1 year, the cash on hand on December 31, 1941, would not have permitted any distribution of any dividend on the new preferred stock. Cash on hand as of December 31, 1941, was $16,848,913, while the requirements through contingent interest, and without any new preferred-stock dividend for 1941, were approximately $16,500,000. The deduction of $16,500,000 from the surplus cash of $38,000,000 left $21,500,000, and that amount would permit the distribution of 2 years' dividends on the new preferred stock, and a dividend of $2.50 per share on the new common stock. It was for these reasons that the distributions in the amounts proposed by the group were adopted.

* * * * * *

"The method of cash distribution proposed by the first and refunding group gives recognition to the relative values of the claims of the respective classes of creditors and reflects the debtor's earning power at different levels of earnings. We also believe that we are warranted in giving considerable weight to the circumstances that all active representatives of the secured creditors have found it acceptable. In our opinion, the first and refunding group's proposed method of distribution is fair and equitable."

The District Court approved the Commission's findings (R., pp. 302, 304, 308). These factual findings, sustained by the Circuit Court of Appeals, would certainly seem to be conclusive on the Debtor.

No secured creditors have objected to the allocation of the cash and additional First Mortgage Bonds which was approved by the Commission and the District Court. Certainly the Debtor has never been able to show and cannot show that the allocation in any way adversely affects the Debtor.

In its petition in this Court, the only contention the Debtor makes is that the allocation is different from what it would have been under what the Debtor calls the "Denver & Rio Grande Doctrine," and under what it calls the "Milwaukee Doctrine." The argument seems to us to have no substance. Valuations necessarily differ in every railroad reorganization case. Different methods of allocation of the new securities and cash have necessarily been followed in each of the railroad reorganization cases which has been approved by the Courts, since the allocations have been governed by the facts of each particular case. Decisions of this Court approving the method of allocation of cash and new securities in a particular reorganization case as fair and equitable do not establish a "doctrine" that a particular method of allocation is the only one that can be used under the facts of any case and be considered fair and equitable. Different methods were used in the *Denver & Rio Grande* case and the *Milwaukee* case; yet both methods were held by this Court to be fair and equitable. *Reconstruction Finance Corporation* v. *Denver & R. G. W. R. Co.*, 66 S. Ct. 1282 (1946); *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523 (1943).

Furthermore, what the Debtor calls the "Denver & Rio Grande Doctrine" is, we submit, a misconstruction of this Court's opinion in that case. We first emphasize that there was in fact no distribution of cash in the Denver & Rio Grande modified plan, and that the total capitalization was not materially changed in the second Denver & Rio Grande plan as compared with the first. Thus, when the Debtor is referring to the "Denver & Rio Grande Doctrine" it is not referring to any allocation which actually was made in that case, but is merely advancing a hypothetical argument based solely on its interpretation of this

Court's opinion in that case. Essentially the argument is that the Commission, having once fixed an effective date of January 1, 1942, could not really change the effective date when the plan came back to it for modification; and that if in form the Commission then purported to change the effective date, the terms of the plan must nevertheless be adjusted to accord with the original effective date. As a result, the Debtor argues that when the Commission changed the effective date of the Rock Island Plan from January 1, 1942 to January 1, 1944, the Commission should have allocated a large part of the earnings in the intervening two years to junior and unsecured creditors, even though the claims of senior creditors were far from satisfied under the first Plan and are far from satisfied under the modified plan. Certainly that is an artificial and unsound theory which cannot be supported by anything this Court said in the *Denver & Rio Grande* case. The Commission effectually disposed of this type of contention (R., pp. 234-6), and its action has been approved by the Courts below. Furthermore, as shown above, the distribution of $38,000,000 of cash in the *Rock Island* case did not constitute merely the distribution of earnings for the years 1942 and 1943 but involved a consideration of the earnings record of the Rock Island from the beginning of the reorganization.

Next the Debtor argues that the distribution of cash and new securities in the present case by the Commission and the District Court is inconsistent with what it refers to as the "Milwaukee Doctrine." The Debtor contends that the "Milwaukee Doctrine" is that if the effective date of a plan is moved forward for a period of years, the only change which should be made in the first plan, with respect to the distribution of any cash earned in the intervening period, is to give each bondholder, senior or junior, interest for those years on his old bonds. Such a method of distribution,

ignoring the relative values and earnings of the respective mortgaged properties, would be plainly unjust.

In fact, the distribution of cash made in the Milwaukee modified plan was not made in accordance with what the Debtor calls the "Milwaukee Doctrine." In the *Milwaukee* case, the effective date was moved forward from January 1, 1939 to January 1, 1944. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company Reorganization,* 254 I. C. C. 707, 712, 722 (December, 1943). The modified Milwaukee plan did not simply provide for payment of the interest accruing on the old bonds during this five-year period. On one large senior issue which was to receive the bulk of the cash distribution, interest was to be paid *from July 1, 1935* to January 1, 1944, the amount for the period between July 1, 1935 and December 31, 1938 being limited to that earned by the mortgaged properties as shown by an earnings and expense formula (254 I. C. C., at p. 712). No interest whatever was to be paid on the $182,000,000 issue of Milwaukee Convertible Adjustment Bonds (254 I. C. C., at p. 739). In other words, no such fixed formula as the Debtor contends for was applied in the *Milwaukee* case with respect to the distribution of cash. The proposed cash distribution was generally agreed to by the interests who were to share in it, and was approved by the Commission and the District Court as fair and equitable in the light of the facts in the *Milwaukee* case.

The mortgage structure and the earnings situation of the Milwaukee and the Rock Island systems were entirely different. The Milwaukee had a relatively simple mortgage structure as compared with the Rock Island, with its complicated overlapping liens and pledged bond issues. With a simple mortgage structure where there are first, second and third mortgages on the same property, it may be equitable to distribute cash in a plan by paying some

interest on the old senior bonds, because cash would thereby be distributed in accordance with the priority of liens. But in the *Rock Island* case, the mortgages are not senior and junior liens on the same properties. For example, the First and Refunding Mortgage, securing the largest amount of bonds, is a first lien on some properties and a second lien on others, and has pledged for it large blocks of other issues of Rock Island bonds in turn secured by first liens or second liens on other Rock Island properties. Distributing cash as interest on the old bonds in such a situation would give no assurance whatever that the allocation was in accordance with the relative earnings or values of the respective mortgaged properties.

No secured Rock Island creditor would have thought it fair, nor could the Commission or the Courts below ever have found it fair and equitable, to distribute a substantial amount of cash among the various secured creditors based merely on the interest accruing on their old bonds without regard to the value or earnings of the properties securing those bonds. As pointed out above, no such inflexible method was used in the distribution in the *Milwaukee* case.

With respect to the distribution of the additional Rock Island First Mortgage Bonds, the *Milwaukee* case is directly contrary to the Debtor's contentions. In the Milwaukee modified plan, additional new securities were allocated in the same proportions in which securities of the same issue were allocated under the first plan (254 I. C. C., at p. 723). That was exactly what was done in the *Rock Island* case in connection with the distribution of the additional new First Mortgage Bonds.

In the *Rock Island* case, the allocation of the cash and additional First Mortgage Bonds was not handled in an offhand or arbitrary fashion. It was largely agreed to, and in no instance objected to, by the secured creditors.

The Commission found that the distribution gave recognition to the relative values of the claims of the respective classes of creditors. The District Court approved the finding, and it has been sustained by the Circuit Court of Appeals.

The Debtor has shown nothing unfair in the method of distribution. It is not in any way affected by the method of distribution. We submit that it is plain that the questions which the Debtor seeks to present to this Court are not questions of law but are factual questions of valuation which are wholly without merit.

Conclusion.

The Debtor contends that its own petition for a writ of certiorari is moot because the District Court has now refused to confirm the Rock Island Plan and has referred it back to the Commission for further proceedings. But the Debtor contends that its petition will cease to be moot in case the appeal taken from that order of the District Court results in reversal. The Debtor therefore asks for an indefinite postponement of decision by this Court on its petition for a writ of certiorari.

With this reasoning and request we must disagree. The decision of the Circuit Court of Appeals, for review of which the Debtor's application is made, affirms an order of the District Court holding the relative allocations of new securities and cash among the various classes of creditors to be fair and equitable. The recent order of the District Court sending the Plan back to the Commission relates only to the rights of one class of creditors, the unsecured Convertible Bondholders, which did not vote to accept the Plan. Whether the recent order of the District Court is reversed

and the Plan then stands as confirmed, or whether the recent order of the District Court is upheld and the Commission is required to adjust the allocations to the unsecured Convertible Bondholders, the decision of the Circuit Court of Appeals sought to be reviewed here established the rights of the various classes of creditors. In the interests of prompt reorganization, the finality of that decision should be promptly settled. If the Debtor's application should stand undecided in this Court, it would simply be a means of furnishing the Debtor with further delay.

We should add that the recent decision of the District Court refusing to confirm the Plan and referring it back to the Commission was not based on any unanticipated developments in the *Rock Island* case justifying the negative vote of holders of unsecured Convertible Bonds, but on the pendency of additional reorganization legislation in Congress. There is no such legislation now pending following the veto thereof by the President.

The Debtor's petition for certiorari should be denied forthwith.

Dated, September 9, 1946.

Respectfully submitted,

WILKIE BUSHBY,
Attorney for Metropolitan Life Insurance Company, as remaining member of the First and Refunding Group,
31 Nassau Street, New York 5, N. Y.

ALEXANDER M. LEWIS,
Attorney for Central Hanover Bank and Trust Company and George S. Hovey, Trustees for First and Refunding Mortgage 4% Bonds of The Chicago, Rock Island and Pacific Railway Company,
70 Broadway, New York 4, N. Y.

DOUGLAS B. STEIMLE,
Attorney for The National City Bank of New York, Trustee for Secured 4½% Bonds, Series A, of The Chicago, Rock Island and Pacific Railway Company,
20 Exchange Place, New York 5, N. Y.

EDWARD W. BOURNE,
Attorney for Protective Committee for General Mortgage 4% Bonds of The Chicago, Rock Island and Pacific Railway Company,
120 Broadway, New York 5, N. Y.

JESSE E. WAID,
Attorney for Bankers Trust Company and R. G. Page, Trustees for General Mortgage 4% Bonds of The Chicago, Rock Island and Pacific Railway Company,
14 Wall Street, New York 5, N. Y.

EDWARD K. HANLON,
Attorney for Protective Committee for the Holders of First Mortgage 4½% Bonds of The Rock Island, Arkansas and Louisiana Railroad Company,
15 Broad Street, New York 5, N. Y.

DANIEL JAMES,
Attorney for Protective Committee for Choctaw, Oklahoma and Gulf Railroad Company Consolidated Mortgage 5% Gold Bonds, and Choctaw and Memphis Railroad Company First Mortgage 5% Gold Bonds,
63 Wall Street, New York 5, N. Y.